

OLC #78-399/97

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21 JUL 1978

MEMORANDUM FOR

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FROM : Office of General Counsel

SUBJECT : Discussion Questions -- Title II, S.2525

1. The questions and comments presented herein are intended to elicit discussion concerning the impact of Title II and the restrictive provisions of Titles I and III (minus Part B of III, electronic surveillance within the U.S.) of S.2525 upon the Agency's collection, retention and dissemination of information on U.S. persons. Based upon meetings and discussions held thus far, both internally and with the SSCI staff, it would appear that Title II will have little effect on current Agency practices. If this is not the case, we must begin to document why it is not in order to establish Agency positions and support proposed modifications.

Title II

2. Sections 213 and 214 of Title II, though phrased in terms of "authority to collect," establish restrictions upon the collection of information concerning U.S. persons. One problem is that the Title does not define either "collect," "collected" or "collection." Sections 213 and 214 provide that counterintelligence, counterterrorism intelligence, and foreign intelligence information may be "collected" concerning a U.S. person if certain facts concerning that person (engaging in espionage, clandestine intelligence activity, acting for foreign power, etc.) are "reasonably believed" to exist. A definition of "collected" or "collection" becomes important because it would determine whether the Agency would be authorized to receive information concerning U.S. persons in situations where there clearly is no basis upon which to form a reasonable belief of the facts specified. For example, liaison services may volunteer information on U.S. persons to us, or provide it pursuant to tacit understandings. Contacts or unpaid sources may do likewise. If

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we are prohibited from accepting such information in order to evaluate it, to what extent, specifically, is valuable information likely to be lost? (When it is received by CIA it is certainly collected in one sense of that word, yet we may have no basis to "reasonably believe" anything about the subject.)

3. The SSCI staff has stated that "collection" as used in Sections 213 and 214 is intended to mean only what is acquired through specific targeting of U.S. persons and that the "reasonable belief" standard is applicable only to the actual initiation of a collection effort concerning a specific U.S. person. In that case, volunteered information would not be "collected" as that term is used in Title II. But whether such information volunteered or incidentally acquired may be retained is unclear based upon Section 231. Section 231(a) authorizes retention of such information if it is "[i]nformation...which is collected in the course of collection of information for any foreign intelligence, counter-intelligence, or counterterrorism purpose..." and falls within one of the seven categories enumerated in that subsection. However, since such volunteered or incidental information is not "collected," as the SSCI staff intends that term to be understood, its retention would not appear to be authorized by Section 231. It is not "information...collected in the course of collection of information..." Thus, notwithstanding its apparent permissible acquisition it could not be retained even if it came within one of the seven specified categories. Again, if we are prohibited from retaining such information to what extent, specifically, would the performance of the Agency's functions be adversely affected?

4. Section 212 empowers the head of each IC entity to designate officials of that entity to authorize the initiation of collection of information on U.S. persons. Though unstated, it is implicit in light of Section 216(a) that those designated officials, in the course of authorizing the initiation of collection, must make a finding that the subject of the collection is "reasonably believed" to be engaging in specified conduct which would permit collection. If that is the intent it should be stated and clarified. Also, to assist those officials who must make such findings, the phrase "reasonably believed" should be defined. To what extent, specifically, will the Agency be prevented from fulfilling its responsibilities if approval of designated Agency official, must be obtained before collecting

information concerning U.S. persons in the areas described in Sections 213 through 222, and if such approval must be founded upon "reasonable belief," assumed at this time to mean that of a reasonably prudent man in the circumstances. "And in determining whether the ...[designated entity official has a reasonable belief] due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." (Standard used in Terry v. Ohio, 392 U.S. 1 (1967) to determine whether police officer has a reasonable belief that an individual is armed, thus justifying a "stop and frisk.")

5. Attached are additional questions for consideration in determining, in terms of significance or numbers of instances, the specific manner and extent to which the restrictions in Titles I, II and III concerning collection of information regarding U.S. persons would have affected CIA activities in the recent past and could be expected to affect them in the future if enacted into law:

Section 132(a). To what extent, specifically, would the prohibition on paid operational or intelligence collection use of clergy, participants in U.S.-sponsored cultural exchange programs, and media personnel unduly impede the Agency? Does Section 132(e), which allows voluntary contacts, alleviate any problems under 132(a)? Will the bars on publication of materials in the U.S., or likely to appear in the U.S., cause specific difficulties not faced by the Agency under current policies?

Section 132(b). What will be the specific impact of the limitations on operational use of PRAs and academicians sent abroad by their institution?

Section 132(f). What would be the specific damage to the Agency if the exemption of contacts with clergy, exchange program participants, media personnel, PRAs, and academicians sent abroad, for the purposes of assisting the Agency in recruitment is read to exclude such contacts with other types of persons?

Section 213. Do the provisions in (1), (2) and (3) create specific difficulties for CIA and are there additional categories of U.S. persons which should be included to allow deliberate collection of information about U.S. persons in a counterintelligence or counterterrorism context?

Section 214. Specifically, how and to what extent would the requirement for a prior finding that the sought after foreign intelligence concerning a U.S. person be "significant"

interfere with CIA activities? Are there foreseeable specific problems in the categories presented in (1) through (4) and are there additional circumstances where targeting of U.S. persons should be allowed for foreign intelligence purposes?

Sections 213 and 214, 215-217. How and to what extent is it likely the collection of necessary counterintelligence, counterterrorism intelligence or foreign intelligence concerning U.S. persons who fit into the categories established by 213 and 214 will be encumbered to the extent of effectively preventing necessary activities from going forward by the procedural limitations of 215 through 217 which require: (i) Attorney General approval (except in exigent circumstances) of the use of various collection techniques, (ii) prior written approval by an Agency official (based on a "reasonable belief" the target fits into one of the 213 or 214 categories, and the further considerations described in 217), (iii) a 90-day initial limitation, (iv) a 90-day renewal if approved in writing by an Agency official, (v) continuation beyond this 180 days only if an Agency official finds in writing that this is "necessary and reasonable," (vi) annual Attorney General review and approval of all such collection continuing beyond 180 days?

Section 217. Based on specific experience, are the considerations described realistic and reasonable guidelines for approvals?

Section 218. Does the limitation to 180 days, without renewal, of collection regarding U.S. persons who are reasonably believed to be "targets" of foreign services or terrorists result in specific concerns for CIA? How will the requirement in (b) that these persons be made witting of such a threat and consent to such collection affect the Agency? Note that the limitations and procedural requirements imposed upon collection under Sections 213 and 214 by Sections 215 through 217, since they are part of a different "subpart," do not appear to apply to collection efforts initiated under the authority of Sections 218 through 222, except as specifically noted in these latter provisions.

Section 219. Are there significant numbers of instances, or a few instances of great significance, where the collection authority described will be useful or where the limitations imposed will be deleterious?

Section 220. How often and to what extent will CIA be prevented from amassing necessary and important information concerning U.S. persons in contact with foreign agents by the limitation here to 90 days without extension and to only

identifying the U.S. person and determining whether that person has access to sensitive information?

Section 221 What specific difficulties are presented by the 90-day limit without extension, the limitations on extent and means of collection, and the requirement for a serious intention to use the subject as a source of information or assistance.

Section 222. In what specific circumstances are the authorizations and limitations in (a), (b) and (c) likely to prove to be inadequate and overly restrictive as concerns legitimate areas of inquiry by CIA? In what respects are the techniques, duration, approval, and collection allowed deficient as to each of these subsections?

Section 225. If this provision means that the procedural approval mechanisms may be considered to be "limitations on duration or techniques" are the categories described in (1) through (4) workable and do they encompass all areas of Agency interest in foreign persons in the U.S.? If the written approval of Agency officials is required under 216 and 217 as to foreign persons who fit the criteria of 213 and 214, what problems may be envisaged for CIA?

Section 231. Are the categories of retention sufficient to allow retention of valuable information concerning U.S. persons? In what specific respects are they insufficient?

Section 232. Are there specific types of information dissemination which are necessary but will not be authorized under (b) through (g)?

Sections 341 and 351. What types of problems, and with what degree of significance and frequency, would result from requiring court orders for physical searches or mail openings regarding U.S. persons abroad?

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